84-782

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

DAVID ALAN LONG,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney for Petitioner
DAVID ALAN LONG

QUESTION PRESENTED FOR REVIEW

I

Whether the decision of the Court of Appeals for the Ninth Circuit ignored applicable Supreme Court and Court of Appeals precedent in affirming the trial Court's denial of Petitioner's motion to set aside the verdict and for a new trial because of the Government's failure to provide Brady and Jencks material after request?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutiional Provisions and Statutes

NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1984

DAVID ALAN LONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

The Petitioner, DAVID ALAN LONG, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 9 August 1984.

OPINION BELOW

On 14 September 1983, the Court of Appeals filed its Opinion reversing Petitioner's conviction and remanding the case for review to the Trial Court for a conviction of violation of Title 18 U.S. Code Appendix § 1202(a)(1)(Possession of a Firearm by an Ex-felon). A copy of the Opinion of the United States Court of Appeals is attached as Appendix "A".

Thereafter, the Court having reviewed documents in camera, in accordance with the Opinion of the Ninth Circuit, the Court found that although materials were submitted to the Court in camera during the trial of the cause which should have been given to defense counsel, that the Defendant was not prejudiced by the Court's failure to review the documents or to turn over the documents to defense counsel. The Court found that the Defendant was not prejudiced using the harmless error beyond a reasonable doubt

standard. The Court then reentered the judgment of conviction and the Defendant appealed therefrom.

On 9 August 1984, the United States Court of Appeals filed its Opinion affirming Petitioner's conviction for violation of Title 18 U.S. Code Appendix § 1202(a)(1) (Possession of a Firearm by an Ex-felon). A copy of the Opinion of the United States Court of Appeals is attached as Appendix "B".

On 26 September 1984, the United States Court of Appeals filed an Order denying Appellant's Petition for Rehearing and rejecting the Suggestion for Rehearing en banc. A copy of that Order is attached as Appendix "C".

JURISDICTION

On 26 September 1984, the United States Court of Appeals for the Ninth Circuit entered its judgment rejecting Petitioner's Rehearing and Suggestion for Rehearing en banc of its judgment affirming the Petition-

er's conviction originally filed on 9 August 1984, (see Appendices "B" & "C"). The jurisdiction of this Court is invoked pursuant to Title 28 U.S. Code § 1254(1).

On 3 October 1984, a motion to stay the issuance of mandate pending application for Writ of Certiorari was filed in the Court of Appeals. As of the date of this petition, there is no decision on the motion.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution,

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and; to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code Section 3500 (Demands for productions of statements and reports of witnesses)

...b) After a witness called by the United States has testified under direct examination, the Court shall, on motion of the Defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified...

...c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Court shall order the United States to deliver such statement for the inspection of the Court in camera. Upon such delivery, the Court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the Court shall then direct delivery of such statement to the Defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the Defendant, and the Defendant objects to such withholding, and the trial is continued to an adjudication of guilt to the Defendant, the entire text of such statement shall be preserved by the United States and, in the event the Defendant appeals, shall be made available to the Appellate Court for the purpose of determining the correctness of the ruling of the trial judge...

Title 18 United States Code

Appendix 1 Section 1202:

(a) Any person who -

(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony, or...and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

On 16 April 1982, a One Count Indictment was returned in the United States District Court for the Southern District of California in Criminal Case No. 82-0318-G. The Petitioner was charged in the One Count Indictment with possession of a firearm by a convicted felon in violation of Title 18 United States Code Appendix Section 1202(a)(1); said offense alleged to have occurred within the Southern District of California. The jurisdiction of the United States District Court for the Southern District of California was invoked pursuant to Title 18 United States Code Section 3231.

On 5 November 1982, a search warrant was executed on the residence at 8646 Carribbean Way, Santee, California. At that time, agents of the Federal Bureau of Investigation seized a .45 calibre semi automatic weapon from between the mattresses of a bed

located in a bedroom jointly occupied by Defendant LONG.

Ultimately, at the trial in this cause, the Defendant stipulated that he was a convicted felon; that he resided at the Carribbean Way address; that the bedroom wherein the weapon was located was jointly occupied by him and his girlfriend, Michelle Clauzell; that the firearm was operable and that the firearm had been transported within interstate commerce. The sole question presented to the jury was that of constructive and/or actual possession.

The Defendant testified that he had no prior knowledge of the weapon being in the bedroom and that the weapon was not his. The Defendant's girlfriend, Michelle Clauzell, testified that the Defendant had no prior knowledge of the weapon being in the bedroom and that the weapon was hers.

The Government's cooperating witness, John Cartwright, testified that he knew

the Defendant LONG through both of their respective associations with the Hell's Angels motorcycle club. Witness Cartwright further testified that for some time preceding 19 November 1981, he had been cooperating with the United States Government in an investigation of various members of the Hell's Angels motorcycle club. Further, he testified that he was in the Federal Government's Witness Protection Program because of threats or anticipated violence directed towards him because of his cooperation.

Witness Cartwright testified that prior to 19 November 1981, he was at the Carribbean Way address, at which time Defendant LONG and he entered the garage at the Carribbean Way address, and underneath a stack of motorcycle parts (on the work bench), he saw what appeared to be a .45 military weapon. Upon cross-examination, witness Cartwright indicated that he was only able to see approximately 30% of the alleged weapon

but could positively identify it as the weapon which was introduced into evidence at the trial.

Witness Cartwright then went on to relate another occasion when he was in the presence of Ron Tate and Defendant LONG at approximately 2:00 a.m. in the morning. Defendant LONG went to a truck and obtained a .45 calibre weapon. Immediately thereafter, Defendant LONG and witness Cartwright went into the back yard of witness Cartwright's house looking for "D.A.'s" behind the bushes. The terrain behind witness Cartwright's house is open fields with bushes and there was no lighting. Once again, witness Cartwright positively identified the weapon as the one introduced at trial. The Defendent produced and introduced into evidence an inoperable facsimile of a .45 calibre weapon identical to the Government's exhibit. Defendent LONG testified that this was the "weapon" he had on the second occasion. He further testified

that Cartwright was acting strangely and that he took him into the fields in the back yard to occupy his time.

Immediately after witness Cartwright's direct testimony, defense counsel made a request for production of all statements in accordance with Title 18 United States Code Section 3500 (the Jencks Act). It should further be noted that the trial began on 28 September 1982. On 10 September 1982, the matter was transferred from Judge Gilliam to Judge Keep for trial. Prior to the transfer, counsel noted to Judge Gilliam that counsel anticipated Jencks Act problems and suggested that a lengthy delay of the trial would be caused between direct and cross-examination of the cooperating witness because of the Government's reliance upon the Jencks Act. Judge Gilliam suggested taking the matter up with Judge Keep.

The matter was transferred to Judge Keep and later that morning, counsel again approached Judge Keep with the Jencks Act problems. Counsel acknowledged that the Government had the right to rely upon the Jencks Act but suggested there would be a lengthy delay between the examination and cross-examination of the cooperating witness Cartwright. The Government countered that it had given all Jencks Act information to counsel. Counsel made a request that the court make an in camera inspection of all the documents that the Government claimed counsel was not entitled to. The Court indicated that this motion should have been brought before Judge Gilliam and that the rulings would be a part of the record. Counsel then again requested Judge Keep to review these documents in camera.

On 21 September 1982, Assistant United States Attorney Robert Semmer, sent a letter along with all materials to Judge Keep

for an in camera review, requesting the same to be sealed.

The matter proceeded to trial. After the direct examination of Government witness Cartwright, the Jencks Act request was made by counsel. The Court made a finding that there were approximately 1500 pages which were submitted for an in camera review. The Court had not read the material submitted by the Government, and the documents pertained to another investigation.

Prior to the trial, counsel had made a decision not to examine or cross-examine witnesses concerning cooperating witness Cartwright's use of drugs for tactical reasons. However, during the trial, witness Cartwright began discussing the Defendant LONG'S providing drugs. Counsel objected and the Court instructed the jury not to consider the drugs and admonished the prosecutor during the lunch hour to insure that no other

mention of drugs was to be made by the witnesses.

Thereafter, an FBI agent, Schneider, in response to the prosecutor's questioning, indicated that in a search of the Defendant's bedroom he found what he suspected to be drugs. Counsel again objected, reminding the Court that the Government had been admonished and the Court admonished the jury that no drugs were found in the bedroom. The jury convicted the Defendant and prior to sentencing, counsel prepared a motion for a new trial, which was denied.

On 7 December 1982, the Defendant filed a Notice of Appeal. The matter was presented to a panel of the Ninth Circuit, namely Judges Alarcon, Price and Norris. The matter was argued and submitted on 5 July 1983. The Court filed a published Opinion, United States v. Long, 715 F.2d 1364 (9th Circuit 1983) on 14 September 1983.

In that Opinion, the Ninth Circuit ordered the District Court to vacate the previously entered judgment and to review some 1500 pages of documents previously lodged in camera to determine if the materials submitted contained discoverable information, and if so, whether the Defendant's trial was prejudiced. On 24 October 1983, the certified copy of the judgment was filed and the judgment of conviction was vacated. Thereafter, at a review hearing, the Court, after reviewing the in camera submission, determined that there was a violation of the Jencks Act and that there were two statements which should have been tendered to counsel. Further, because this was a Sixth Amendment violation, the Court determined that she must review the error using the standard "harmless error beyond a reasonable doubt". The Court ruled that the failure to disclose these statements was harmless error beyond a reasonable doubt. These statements, which should

have been tendered to counsel, dealt with Government witness Cartwright's prior inconsistent statements regarding his use of narcotics. Counsel reminded the Court that the tactical decisions had been made regarding cross-examination and introducing evidence regarding drugs/narcotics without these statements, but the Court concluded that the error was still harmless beyond a reasonable doubt.

Notice of Appeal was filed on 17 November 1983. The matter was again argued before the Ninth Circuit on May 7, 1984 and an unpublished Opinion affirming the conviction was filed on 9 August 1984. Petition for Rehearing and Suggestion for Rehearing en banc was denied by Order filed 26 September 1984.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Ignores Applicable Supreme Court And Court Of Appeals Precedents In Affirming The Trial Court's Denial Of Petitioner's Motion To Set Aside The Verdict And For A New Trial Because The Government Failed To Provide Brady And Jencks Material After Request.

The standard of review in a case wherein the Government fails to disclose impeachment and exculpatory materials to the defense, after specific request for the same, is not consistent within the Ninth Circuit. In Bagley v. Lumpkin, 719 F.2d 1462 (9th Cir. 1983), the Ninth Circuit adopted a per se reversal when the Government failed to disclose impeachment material after a specific request by the defense.

In Bagley, the defendent proceeded to trial having waived a jury. The Court, after hearing the evidence, acquitted

the defendent of some charges and convicted the defendent of other charges. The defendent, prior to trial, had requested information regarding payment to the Government's cooperating witness by the Drug Enforcement Administration. The Government failed to disclose any such payment.

After trial, the defendant learned that the cooperating Government witness did in fact receive payment from the Drug Enforcement Administration. A motion was made to the trial Court wherein the new evidence was heard by the trial Court, and the Court who sat through the trial without a jury made a finding that the new evidence would not have altered the court's decision and further made a finding that it was harmless error beyond a reasonable doubt.

The Ninth Circuit in Bagley reversed the conviction, stating:

"...but a failure to disclose requested Brady information that the defendant

could use to conduct an effective cross-examination is even more egregious because it threatens the defendant's right to confront adverse witnesses and therefore his right to a fair trial".

Unlike the Bagley case, the Defendant LONG, in the instant action proceeded by way of jury trial, resting his case in the hands of twelve jurors rather than the trial judge. The jury deliberated approximately 3-1/2 hours on a One Count Indictment charging the Defendant with being an ex-felon in possession of a handgun. The Defendant stipulated to every element of the offense, except possession. The only corroborating evidence of his possession, be it constructive or actual, was witness Cartwright's testimony.

The Defendant elected not to pursue any questions regarding the use of drugs for tactical reasons prior to trial. However, the Defendant was not armed with the prior inconsistent statements of the cooperating witness, Cartwright, which where within the

Jencks/Brady material which the Government gave to the judge for an in camera review, but which were never reviewed prior to trial and were only reviewed by the judge after reversal of the conviction on appeal. After reviewing the documents, after reversal on appeal, the Court found that there were two prior inconsistent statements regarding witness Cartwright's involvement with drugs. But in considering the trial testimony and the efficient cross-examination of the witness, the trial Court found the failure to disclose this information was harmless error beyond a reasonable doubt. It should be noted that the cross-examination that the Court discusses was impeachment and cross-examination on matters other than drugs. It should further be noted that it was not the defense that brought in mention of drugs, but that it was the Government witness's continually "slipped" into evidence mention

of drug involvement of the witness and defendant.[1]

In United States v. Uramoto, 638 F.2d 84 (1980), the Ninth Circuit addressed a similar situation. In that case, the Circuit ruled:

> Although the Government's case against Uramoto is strong, the harmless error doctrine is inapplicable. The Supreme Court has declared repeatedly that a denial of the right of cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Smith v. Illinois, 390 U.S. 129 (1968); see Davis v. Alaska, 415 U.S. 308 (1974).

In Chipman v. Mercer, 628 F.2d 528 (9th Cir. 1980), the Ninth Circuit at page 533, stated:

> Confrontation clause doctrine appears to require reversal if there is any error; whether the error was harmless in the particular case is not considered. Davis v. Alaska, supra;

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[1]Motions for mistrial were denied. The Court instructed the jury that there were no drugs found in the residence and that the jury should not consider mention of drugs.

Skinner v. Cardwell, 564 F.2d 1381 (9th Cir.1977), cert. denied, 435 U.S. 1009 (1978).

The Ninth Circuit has fashioned a rule in Bagley, that the same Court sitting without a jury cannot consider evidence which was denied the defense at trial and uphold a verdict. This was decided because the Sixth Amendment clause is so fundamental to a fair trial. Yet, in the instant case, the Circuit has determined that the trial Court, who did not sit as trier of fact, who was not asked to determine the guilt or innocence of the Defendant, unlike Bagley, can somehow determine if the evidence which was not disclosed to the Defendant and which prevented him from effective cross-examination and impeachment of the sole Government eyewitness, would have altered the outcome of the verdict. The distinction defies logic.

The Defendant took every step along the way to discover if this evidence was available, giving the Court advance notice that there were many reports that the Defendant claimed should be turned over to him to effectively cross-examine the witness. The Court refused to review the documents in camera. The Ninth Circuit ultimately reversed his conviction requiring a new hearing before the trial Court, and the trial Court acknowledged that there were reports that should have been tendered to the defense for cross-examination.[2]

It defies logic that a defendant who goes by Court trial should be afforded more constitutional rights than one who requests that he be afforded his full panapoly

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[2]It should be noted that to date defense counsel has not been provided even with those statements which the Court found should have been turned over. The Court has sealed all statements which are currently a matter of record in the Ninth Circuit.

of rights as accorded by the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner DAVID ALAN LONG respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Cirucit.

Respectfully submitted,

J. WILLIAM BEARD, JR.
Attorney for Petitioner
DAVID ALAN LONG

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PROOF OF SERVICE

I, Sandra A. Bringas, hereby declare:

I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within action.

My business address is 2366 Front Street, San Diego, California 92101.

On November 1, 1984, I placed in an envelope with postage prepaid, a copy of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT to the following:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 1st day of November, 1984 at San Diego, California.

Sandra A. Bringas
SANDRA A. BRINGAS

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

v.

DAVID ALAN LONG,

Defendant and Appellant.

No. 82-1746

United States Court of Appeals,
Ninth Circuit.

On Appeal from the
United States District Court
for the Southern District of California
The Honorable Judith Nelson Keep
District Judge, Presiding

Argued and Submitted 5 July 1983

Decided 14 September 1983.

Before: ALARCON and NORRIS, Circuit Judges, and PRICE,* District Judge.

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*Honorable Edward Dean Price, United States District Judge, for the Eastern District of California, sitting by designation.

APPENDIX "A"

PRICE, District Judge:

Appellant was convicted following a jury trial for violation of one count of possession of a firearm by a convicted felon [18 U.S.C.App. § 1202(a)(1)]. Judgment was entered upon such conviction, and defendant appealed. Three issues are presented for this court's consideration:

(1) Did the trial court err in failing to review some fifteen hundred (1500) pages of documnts containing witness statements which the Government conceded was potentially Jencks material?

(2) Did the trial court err in failing to provide defense counsel with a complete copy of the affidavit used in support of the search warrant obtained to search the defendant's residence, as well as copies of the wiretap inercepts?

(3) Did the trial court err in failing to grant defendant's motion for a

mistrial based upon alleged prejudicial statements made by government witnesses?

I. JENCKS ACT MATERIALS

[1] Promptly upon the case being transferred to the district judge who ultimately tried the case, defendant's counsel notified the trial judge that he would be requesting certain Jencks material that he had previously attempted to obtain through discovery motions. The court observed that the Jencks Act did not require that statements pertaining to other investigations and not pertaining to the instant case be made available.

Approximately six days prior to trial, as a precautionary measure, the U.S. Attorney's Office addressed a letter to the trial judge with a copy to defendant's counsel, which stated in pertinent part as follows:

At the last appearance in court on the above-captioned matter, defense counsel raised the issue of whether he had been provided with all 3500 material pertaining to government witness John Cartwright. We represented to the court that all interview reports and grand jury material relevant to the subject matter of Mr. Cartwright's testimony in this case had been tendered to counsel.

In order to insure that the record is accurate and complete on this matter, we are enclosing a list of interview reports made by FBI agents which list also indicates which reports and grand jury testimony, or parts thereof, have been tendered. For the convenience of the court, those portions of the reports or testimony which have been tendered are marked. Enclosed with this list is a copy of all reports an grand jury testimony of which a review can be made to

substantiate the government's prior representations to the crout and counsel.

After the witness Cartwright testified, the following colloquy occurred between court and counsel:

MR. BEARD: The only other thing is, just for the record, I've made my Jencks Act request, they say they've complied. I understand there's a bunch of documents under seal that I haven't seen, so-you know.

THE COURT: There are.

MR. BEARD: Well, okay, I'm just saying they're going to have to stay there obviously for valid purposes.

THE COURT: Yeah. And I've not read them either. 1500 pages, mainly pertaining to another investigation, I'm not poring through.

MR. BEARD: Well, I don't know that they do. I'm making my request.

THE COURT: Okay.

It is apparent from the record that the trial judge was relying on information other than that gleaned by personal inspection of the documents submitted in camera for the factual determination that they pretained to other investigations, and were not material to the instant trial.

18 U.S.C. § 3500(c) provides as follows:

If the United States claims that any statement ordered to be produced under this section contains matter which does not related to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his

use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determing the corrctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation or its use in the trial.

Palermo v. United States, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959), is th first case wherein the United States

Supreme Court considered the application of 18 U.S.C. § 3500. In the course of the examination of the legislative history and purpose of that section, Justice Frankfurter, speaking for a unanimous court, observed:

> It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases the answer will be plain from the statement itself. In others further information might be deemed relevant to assist th court's determination. This is a problem of the sound and fair administration of a criminal prosecution and need, reflected in so much of our law of evidence, to avoid needless trial of collateral and confusing issus while assuring the utmost fairness to a criminal defendant.

See, e.g., Nardone v. United States, 308 U.S.

338, 342, 84 L.Ed. 307, 312, 60 .Ct. 266 [268].

Palermo v. United States, supra, 360 U.S. at 354-355, 79 S.Ct. at 1225-1226.

Campbell v. United States, 365 U.S. 85, 95, 81 S.Ct. 421, 426, 5 L.Ed.2d 428, described th trial judge's function under 18 U.S.C. § 3500, with more specificity:

> The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interests potected by the statute - safeguarding government papers from disclosure, and the interest of the accused in having the government produce "statements" which the statute requires to be produced.

Although not concerned with the precise issue we now face, the Ninth Circuit

followed the teaching of Campbell in Ogden v. United States, 303 F.2d 724 (9th Cir. 1962).

Recently the Ninth Circuit approved the procedure mandated in Palermo. See United States v. Jones, 612 F.2d 453 (9th Cir. 1979). Other circuits considering the matter are in accord: See United States v. Tomaiolo, 280 F.2d 411 (2nd Cir. 1960); Saunders v. United States, 316 F.2d 346 (D.C.Cir. 1963); Hilliard v. United States, 317 F.2d 150 (D.C.Cir. 1963); United States v. Keig, 320 F.2d 634 (7th Cir. 1963); United States v. Chitwood, 457 F.2d 676 (6th Cir. 1972); United States v. Cleveland, 477 F.2d 310 (7th Cir. 1973). Significantly, however, a trial judge's failure to review in camera does not necessarily require a dismissal. As indicated in Ogden, supra, a case merely need be remanded with direction to the trial judge to conduct a belated in camera review.

II. THE SEARCH WARRANT

[2] As a part of the prosecution's case, the government was engaged in an extensive investigation, only a part of which focused on the defendant. In the course of this investigation, a general affidavit for a search warrant was prepared, only parts of which concerned the search of the defendant's residence. In addition, the government conducted a wire tap upon the defendant's telephone. The judge who heard the defendant's discovery motions did not make a written order. However, at the conclusion of the discovery motion hearing, the district court judge stated:

> What the court has done is reviewed the affidavit and search warrant to determine if there is any material there that would aid and assist you in preparing for a suppression motion, or if there is any relevant material. In light of the in camera hearing the court will make the finding it is not; therefore,

you are not entitled to have the balance of the material.

For the record, I will ask the clerk to mark this as court's exhibit number one and place it in the file and it can be subject to your review if you care to appeal.

Reporter's Transcript, Volume II, pp. 9:19-25, 10:1-3.

With regard to the Title III intercepts, the government represented to the court that counsel had been given "all of the transcripts relating to any conversation that Mr. Long had intercepted [sic]". The government also represented that it did not intend to use any of the conversations. Again the district judge hearing the motion ruled that the defendant had received everything to which he was entitled.

As stated in United States v. Lee, 589 F.2d 980 (9th Cir. 1979): "Finally, '[t]he scope of discovery under Rule 16 is

within the discretion of the trial judge an is not reviewable absent abuse.' United States v. Evans, 542 F.2d 805, 809 (10th Cir. 1976), cert. denied, 429 U.S. 1101, 97 S.Ct. 1124, 51 L.Ed.2d 550 (1977). See also United States v. Fulton, 549 F.2d 1325, 1328 (9th Cir. 1977)."

A full reading of the applicable portion of Lee, supra, indicates that a showing of prejudice to appellant's ability to defend himself is a primary method of demonstrating abuse. Clearly, appellant has demonstrated no pejudice resulting from the district court's rulings on his discovery motions.

III. DEFENDANT'S MOTION FOR MISTRIAL

[3] On two different occasions, two different government witnesses in response to non-provocative questions volunteered information that would connect the appellant, an admitted member of the

Hell's Angels, with the unlawful possession of narcotics. At a side bar conference and out of the hearing of the jury, the court admonished the Assistant U.S. Attorney to carefully prepare the first witness so testifying to guard against any further prejudicial statements. The court then admonished the jury to disregard the answer. The witness under examination at that time was a lay witness who was the government's informant. Later that afternoon while FBI Agent Schneider was on the witness stand he made a reference to "some things we suspected to be drugs." Again the trial court, in timely fashion, admonished the jury that the substances found were not drugs, and that

drugs had nothing to do with the instant case.[1]

[4] Considering the entire record in this matter, we cannot say that the two foregoing references to drugs so pervaded the trial that it was unfair. See United States v. Nace, 561 F.2d 763, 769 (9th Cir. 1977).

The judgment will be vacated and the cause remanded to permit the trial court to conduct an in camera hearing to determine whether any of the 1500 pages of documents submittd to the trial court by the government

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[1]We note in passing that these two voluntary statements were offered by successive government witnesses. While we find no basis to believe that the Assistant U.S. Attorney was aware that these voluntary statements were going to be made, we would be remiss if we did not insert a cautionary warning that it is the obligation of prosecutors to take all steps necessary to avoid the insertion of such prejudiciail, nonrelevant testimony. Governmental law enforcement resources, beginning with the agents in the field and ending with the appellate courts, are so limited that it behooves all within the system to take every precaution against the inadvertent submission of prejudicial material that may require reversal of an otherwise "solid" conviction.

should have been produced to the defendant under the provisions of 18 U.S.C. § 3500. A new trial will be required only if the court, after conducting such in camera inspection, concludes that a producible document or documents exist, and that the substantial rights of the defendant were affectd by failure to make such documents available for defendant's use in the cross-examination of the witness Cartwright. Assuming that the trial court determines that a Jencks Act document does exist, the court may nevertheless conclude that the substantial rights of the defendant were not affected by its non-production. If a new trial is denied, the district court will enter a new and final judgment, thus preserving defendant's right to appellate review of the district court's action.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	NO. 83-5268
	)	D.C. No.
v.	)	CR 82-1318
	)	
DAVID ALAN LONG,	)	MEMORANDUM*
	)	
Defendant-Appellant.	)	
	)	

Argued and Submitted - May 7, 1984

Decided - August 9, 1984

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge, Presiding

Before: TANG and BOOCHEVER, Circuit Judges,
and SOLOMON,** District Judge.

Appellant David Alan Long appeals

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

**Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

APPENDIX "B"

the judgment of conviction under 18 U.S.C. § 1201(a)(1) (possession of a firearm by a convicted felon) reentered by Judge Judith Keep on remand from this court. After examining government exhibits in camera pursuant to the remand, Judge Keep determined that while the government erred in failing to turn over two prior statements of government witness John Cartwright, the error was not of constitutional magnitude and was harmless beyond a reasonable doubt. Upon review, we affirm that finding.

Appellant Long's counsel contends that the government's failure to produce Cartwright's prior statements (FBI Report dated 5-26-81) denying his use of drugs so impaired effective cross-examination of the witness as to require reversal of Long's conviction. We disagree. The statements which the government erroneously withheld were not relevant to the substantive issue of defendant's guilt or innocence, merely to the

impeachment of a witness. Moreover, as the trial court noted in the rehearing on remand, witness Cartwright was substantially impeached at trial on other grounds. A harmless error standard is, therefore, appropriate. Cf. Bagley v. Lumpkin, 719 F.2d 1462 (9th Cir. 1983) (automatic reversal required where governmnt prevented defendant from conducting effective cross-examination of governmnt witness by erroneously answered request for information). The principal evidence supporting defendant's conviction was the gun found under his mattress in his house. That evidence remains unchallenged. Thus, the government's failure to produce the information was harmless beyond a reasonable doubt. Goldberg v. United States, 582 F.2d 483 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979).

Appellant Long's counsel next argues that due process mandates reversal in this case due to the court's loss of

previously submitted in camera materials. This contention has no merit. The materials were indeed lost. However, a duplicate set was provided by the government which the trial court carefully examined.

The trial court's finding that the government erred in failing to produce two prior statements made by witness Cartwright but that such error was harmless beyond a reasonable doubt is sustained and accordingly, the conviction is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NO. 83-5268
	)	
Plaintiff-Appellee,	)	D.C. NO.
	)	CR 82-0318
vs.	)	
	)	ORDER
DAVID ALAN LONG,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: TANG and BOOCHEVER, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.